In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-614

CLIFFORD SEVERSON and MABEL SEVERSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A12) is reported at 447 F.2d 631. The opinion of the district court (Pet. App. A1-A5) is reported at 309 F.Supp. 915.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1971, and a petition for rehearing was denied on September 13, 1971 (Pet. App. A13). The

petition for a writ of certiorari was filed on November 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether title to unsurveyed public lands which are islands in a navigable stream is vested, by operation of law and without express conveyance, in the successor in interest of the patentee of adjacent shore lands.

STATEMENT

The United States brought this action to quiet title in itself to portions of two unsurveyed islands in the Mississippi River (Pet. App. A6, A9-A10). Petitioners, who own certain patented shorelands located adjacent to the islands, were the chief adverse claimants. The district court upheld the government's claim, and the court of appeals affirmed.

The material facts are not in dispute and are set forth fully in the district court's opinion (Pet. App. A1-A3). In the late 1800's, the United States patented and sold certain shorelands along the east bank of the Mississippi River, in the State of Wisconsin, portions of which are now owned by petitioners. Immediately west of those lands, but east of the thread of the river, are two islands, a part of which petitioners claim by reason of their ownership of the shorelands. Neither was surveyed at the time the shorelands were patented.

The channel separating the island closest to the Wisconsin shore gradually filled and became dry land.

The lands formerly composing that island were surveyed in 1935, and contain 468.15 acres. The second island is still encircled by the river, and is also sizeable. Portions of the first island have been patented to private parties or granted to the State of Wisconsin; the rest of it, and all of the second island, are unpatented and have been administered by the government as part of a federal game refuge.

The two islands were in existence when Wisconsin became a state in 1848. The district court found that the land in question "is substantial and lies above normal high water lines except in times of flood when it may be completely or partially covered by water for several weeks" (Pet. App. A3). It held that on these facts, title to the unpatented public lands comprising the islands remained in the United States under *Scott* v. *Lattig*, 227 U.S. 229; it rejected petitioners' argument that, as owners of the adjacent shore, they owned the lands in question by operation of Wisconsin law. The court of appeals affirmed, holding that *Scott* v. *Lattig* was controlling and dispositive in favor of the government.

ARGUMENT

The decision below is in accord with firmly established principles of federal law. There is no conflict or other reason warranting review by this Court.

1. In *Scott* v. *Lattig*, this Court held (227 U.S. at 244) that an island located in the Snake River, but not surveyed, when Idaho entered the Union, "did not pass to the State or come within the disposing influence of its laws. On the contrary, although sur-

rounded by the waters of the river and widely separated from the shore, it was fast dry land, and therefore remained the property of the United States and subject to disposal under its laws * * *." This principle was confirmed a few years later in *Moss* v. *Ramey*, 239 U.S. 538, and is a well-settled rule of federal land law. See, also, *Lee Wilson & Co.* v. *United States*, 245 U.S. 24; *Gauthier* v. *Morrison*, 232 U.S. 452.

As both courts below held, the facts of the present case place it squarely within the rule of *Scott* v. *Lattig*, and *Moss* v. *Ramey*. As in those cases, the lands here in issue were large, unsurveyed islands in a navigable river, to which patentees of the adjacent shorelands asserted title by reason of their owning the shorelands. The Court explained the controlling doctrine in the *Moss* case (239 U.S. 546):

> Thus the facts bearing on the status of the island and the operation of the patents are essentially the same as in *Scott* v. *Lattig*, and, in view of what was there held, it suffices to say: The error of the surveyor in failing to extend the survey over the island did not make it any the less a part of the public domain. It was fast dry land, and neither a part of the bed of the river nor land under water, and therefore did not pass to the State of Idaho on her admission into the Union but remained public land as before. The descriptive terms in the patents embraced the lots abutting on the river, as shown on the plat, but not this island lying between the lots and the thread of the stream. *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District*,

> 232 U.S. 186; *Gauthier* v. *Morrison*, 232 U.S. 452; *Producers Oil Co.* v. *Hanzen*, 238 U.S. 325. The claim that the island passed under the patents is therefore ill founded. * * *

2. Contrary to petitioners' suggestion (Pet. 6-8), this case involves "fast, dry land", just as the *Scott* and *Moss* cases did. This is not altered by the fact that the islands may be partially flooded annually, or were twice totally underwater for a brief period when the water was abnormally high. The court below noted (Pet. App. A9-A10) that the islands here, like those in *Scott* and *Moss*, were high enough to have permanent vegetation and to permit farming. Thus, this case does not, as petitioner urges (Pet. 7), present an open federal question; quite the contrary, the operative facts are the same as *Scott* and *Moss*, and a result other than that reached below would have significant unsettling effects on long established federal land law.

3. Petitioners' other contentions similarly are without substance. The issue here, concerning the rights of successors in title to patentees of federal lands with respect to other federal land, "is governed by federal, not state, law" (*Hughes* v. *Washington*, 389 U.S. 290, 291). Consequently, the Wisconsin decisions on which petitioners rely are not controlling. As the court of appeals concluded (see Pet. App. A8), this is the necessary import of *Scott* v. *Lattig*. The claim that this case is different because the lands comprising the State of Wisconsin were subject to the Northwest Ordinance was correctly rejected by the court below (Pet. App. A12).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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